

In the Supreme Court of the United States

October Term, 1977

No. 77-397

Supreme Court, U. S.

FILED

SEP 29 1977

MICHAEL RODAK, JR., CL

ROBERT R. SCOTT, dba SLICK NICK'S,

Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE
CONTROL OF THE STATE OF CALIFORNIA;
AND ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

APPENDIX TO JURISDICTIONAL STATEMENT

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Robert R. Scott, dba Slick Nick's*

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TO SUPPLEMENTAL APPENDIX TO
JURISDICTIONAL STATEMENT**

EXHIBIT F:

In the Matter of the Accusation Against Robert R.
Scott, dba Slick Nick's Saloon, 13065 East Valley
Boulevard, La Puente, California,

Respondent & Licensee,

On-sale beer conditional license
Under the Alcoholic Beverage Control Act.

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EXHIBIT G:

Notice of Appeal 15, 16

**In the Supreme Court of the
United States**

October Term, 1977

No. 77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA; AND ALCOHOLIC
BEVERAGE CONTROL APPEALS BOARD,

Appellees.

**APPENDIX TO
JURISDICTIONAL STATEMENT**

FILED

MAR 21 1977

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARDBEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	AB-4320
Against	File No. 64421; Reg No. 3998
	ALJ: Sarkisian
ROBERT R. SCOTT	Date and Place of Hearing:
dba Slick Nick's Saloon	February 23, 1977
13065 East Valley Boulevard	314 West First Street
La Puente, California	Los Angeles, California
Respondent & Licensee	For Department:
On-sale beer conditional license	Honorable Evelle J. Younger
Under the Alcoholic Beverage	Attorney General
Control Act.	John J. Grimmins
	Deputy Attorney General
	For Appellant:
	Kenneth P. Scholtz, Esq.

Appellant Robert R. Scott, doing business as Slick Nick's Saloon, has appealed a decision of the Department of Alcoholic Beverage Control which determined that appellant violated Section 143.3, subdivision (1)(c), of Title 4 of the California Administrative Code as to Counts I, II, IV, V, VII and VIII; that appellant violated Section 143.3, subdivision (2) of said code as to Counts III, VI and IX; and, that grounds for the suspension or revocation of appellant's license were established pursuant to subdivisions (a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution as to Counts I through IX. As a penalty, it was ordered that appellant's

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EXHIBIT F

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license be suspended for thirty days on each of Counts I through IX, separately and severally, said suspension to run concurrently for a total suspension of thirty days. Count X was dismissed.

The department's decision further provides:

"FINDINGS OF FACT:"COUNT I

"On or about May 16, 1975, the above-named on-sale licensee did permit Bonnie Lou Dorothy Davis to perform acts in the above-designated on-sale licensed premises, at which time said Bonnie Lou Dorothy Davis did display her pubic hair.

"COUNT II

"On or about May 16, 1975, the above-named on-sale licensee did permit an unidentified female dancer, whose first name is known only as "Nichole", to perform acts in the above-designated on-sale licenses [sic] premises, at which time said female dancer did display her pubic hair.

"COUNT III

"On or about May 16, 1975, the above-named on-sale licensee did permit entertainers Bonnie Lou Dorothy Davis and an unidentified female dancer whose first name is known only as "Nichole", to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT IV

"On or about August 21, 1975, the above-named on-sale licensee did

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permit Patricia Louise Trammell to perform acts in the above-designated on-sale licensed premises, at which time said Patricia Louise Trammell did display her pubic hair.

"COUNT V

"On or about August 21, 1975, the above-named on-sale licensee did permit Kathleen Mary Ryan to perform acts in the above-designated on-sale licensed premises, at which time said Kathleen Mary Ryan did display her pubic hair.

"COUNT VI

"On or about August 21, 1975, the above-named on-sale licensee did permit entertainers Patricia Louise Trammell and Kathleen Mary Ryan to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT VII

"On or about August 28, 1975, the above-named on-sale licensee did permit Patricia Louise Trammell to perform acts in the above-designated on-sale premises, at which time said Patricia Louise Trammel [sic] did display her pubic hair.

"COUNT VIII

"On or about August 28, 1975, the above-named on-sale licensee did permit Joan Irene Gaudet to perform acts in the above-designated on-sale licensed premises, at which time said Joan Irene Gaudet did display her pubic hair.

"COUNT IX

"On or about August 28, 1975, the above-named on-sale licensee did permit

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entertainers Patricia Louise Trammell and Joan Irene Gaudet to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT X

"On or about May 24, 1974, the above-described alcoholic beverage license was issued to the respondent-licensee for the above-designated premises, subject to the following conditions:

"That the petitioner shall not permit the following conduct or acts upon the licensed premises:

- "(1) Employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
- "(2) Employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
- "(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

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- "(4) Permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breasts, genitals, anus, pubic hair or any portion thereof.
- "(5) Permit any person to perform acts of or acts which simulate:
 - "(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
 - "(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
 - "(c) The displaying of the pubic hair, anus, vulva or genitals.
- "(6) Subject to the provisions of subdivision (5) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.
- "(7) Permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.
- "(8) Permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.
- "(9) Permit the showing of film, still pictures, electronic reproduction; or other visual reproductions depicting:
 - "(a) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality,

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- oral copulation, flagellation or any sexual acts which are prohibited by law.
- "(b) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
- "(c) Scenes wherein a person displays the vulva or the anus or the genitals.
- "(d) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

"The foregoing conditions duplicate language contained in rules 143.2, 143.3, and 143.4. Although respondent, by virtue of the matters set forth in the findings as to Counts I through IX, violated the conditions, the conduct is not an independent cause for discipline.

"FINDINGS RE PREVIOUS LICENSE RECORD:

"Licensed as above since May 24, 1974 with the following record of disciplinary action: Reg. #02898, dated 3/21/75 for violation of 25607, 647(f) P.C. Decision pending."

This appeal is based upon all the grounds available under Business and Professions Code section 23084.

John Ellis Schillin, a Department Special Investigator, testified for the department that he entered respondent's premises on May 16, 1975 accompanied by Investigator Griffin. He was charged \$2.00 to enter (R. T. 6). He described the stage therein as approximately one-and-one-half feet high, with a two-and-one-half foot wide bar separating the patrons

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from the stage. A person identified as Nichole danced totally nude on the stage. Her pubic hair was fully exposed to view. She came within three feet of the patrons seated about the stage (R. T. 8). Subsequently, one Bonnie Lou Dorothy Davis danced on the stage nude, with the exception of boots. Her pubic hair was fully exposed to view (R. T. 10). She also danced within three feet of the nearest patrons seated about the stage (R. T. 10).

On August 21, 1975 Investigator Schillin again entered the subject premises with Investigator Barnes. The interior of the premises was not any different than as depicted in his May 16, 1975 testimony. He observed one Patricia Louise Trammell perform nude on the stage, exposing her pubic hair. He also observed one Kathleen Mary Ryan dance totally nude before patrons and expose her pubic hair (R. T. 14 - 15). Ms. Trammell danced within three feet of the patrons seated about the stage.

On August 28, 1975 he again entered the subject premises with Investigator Barnes. The interior of the premises was the same as previously testified to, supra. They again observed Ms. Trammell dancing on the stage, within four feet of the nearest patrons, in a state of total nudity (R. T. 20). On that date, he also observed one Joan Irene Gaudet dancing on the stage totally nude, with her pubic hair fully exposed to view (R. T. 18). She danced within four feet of the nearest patrons.

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He observed the seats around the bar near the stage were theater-type seats, to the best of his recollection, which were affixed to the floor (R. T. 23). He testified the seats were approximately two-and-one-half to three feet from the bar itself, but patrons could lean forward and put their elbows and torsos upon the bar counter. He observed some patrons leaning forward on the bar counter and touching it with their bodies (R. T. 28). On May 16, 1975 he observed both Nichole and Davis pick up U. S. currency from the bar while still on the stage in a state of undress (R. T. 26 - 27).

Lloyd Griffin, a Department Special Investigator, next testified for the department. He stated that on May 16, 1975 the seats around the bar next to the stage were approximately two feet from the edge of the bar, and the bar was approximately two to three feet wide. He observed some of the patrons leaning forward in the seats so their arms or elbows were on top of the bar. He observed a performer on the stage being approximately three feet from the nearest patron. He observed Nichole and Davis dance upon the stage completely nude (R. T. 50 - 51). While nude, both ladies retrieved U. S. currency from the bar along the stage, coming within three to four feet of the nearest patrons.

Leslie Eugene Barnes, a Department Special Investigator, testified with regard to May 16, 1975. He made a rough sketch of the premises while therein, which was not drawn to scale (Department's Exhibit 1). He examined the chairs around

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the bar counter next to the stage and estimated they were approximately two feet from the bar counter which was on the edge of the stage (R. T. 59), and that the bar counter is approximately two feet wide (R. T. 59). The stage itself runs underneath the bar counter approximately one foot (R. T. 59).

On August 21, 1975 he again entered the subject premises and observed Ryan and Trammell dancing completely nude and approaching the bar stage, with their shins almost touching the bar counter. He observed them seize the bar counter with their hands. (R. T. 60 - 61.)

He also visited the subject premises on August 28, 1975 and observed Gaudet and Trammell dance completely nude (R. T. 63); Trammell danced within three feet of the nearest patrons, some of whom were leaning on the bar counter (R. T. 64). He estimated the distance from the seats to the edge of the bar was approximately two feet, measuring from the back portion of the seat, and that people could put their feet underneath the bar (R. T. 66 - 67). He testified, inter alia:

"Q Is it your estimate, then, that the distance between the front of the bar counter -- strike that. Is it your estimate that the aisle width between the front of the bar counter and an open chair is only six inches to one foot?

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"A Well, if the chairs are up, it's about a foot. I remember when I walked between there, I had to turn sideways. It was difficult to walk straight in between the two.

"Q So your estimate is about -- it's a good six inches to one foot when the chairs are not open.

"A Yes, sir."

(R. T. 67:5 - 14.)

In addition to the other exhibit previously mentioned, the Department also introduced a copy of the licensee's license, Notice of License Correction, as well as a Petition for a Conditional License (Department's Exhibit 2); the licensee's previous history (Department's Exhibit 3); and the previous history of the subject premises with regard to Department violations (Department's Exhibit 4).

Robert Richard Scott, the respondent, testified as a witness in his own behalf. He testified that he had been presenting nude entertainment at the subject premises for approximately one month prior to the date of the first violation alleged in the accusation (May 16, 1975). The stage was rebuilt and the bar itself was widened to three feet. The seats were installed to measure six feet from the inside of the bar area to the back of the seat (R. T. 77). He testified he measured the distance from the seats to the stage, and that the back of the seat to the beginning of the stage

measured 72 inches (R. T. 77). With the seat down, the distance to the edge of the bar from the edge of the seat is approximately a foot to a foot-and-a half (R. T. 84), and he has observed his patrons leaning from the seats onto the bar around the stage (R. T. 84 - 85). He further testified with regard to the theater status of the subject premises (R. T. 77 - 83). He was aware of the department's rule against nude dancing when he initiated nude dancing in the subject premises (R. T. 84).

Respondent introduced two exhibits: Los Angeles County ordinance vis-a-vis indecent exposure in public places, showing an exception for theaters (Respondent's Exhibit A); and a copy of a preliminary injunction issued by the Superior Court for the County of Los Angeles vis-a-vis enforcement of the county ordinance by local police officials during the pendency of an action (Respondent's Exhibit B).

Upon appeal appellant contends: the evidence does not establish a violation of the six foot rule since the seats were six feet from the stage; and rule 143.3 has been preempted by sections 318.5 and 318.6 of the Penal Code, which permits nude dancing in theaters, concert halls and similar establishments primarily devoted to theatrical entertainment.

Appellant's contention that no violation of the six foot rule was proved as to Counts III, VI and IX is devoid of merit. The testimony of the department investigators indicate the dancers came within three to four feet of patrons. There was no showing that the patrons were doing anything

unusual, in the way of reaching, while seated at the bar surrounding the stage. The facts also established that the stage was less than six feet from the nearest patron. Hence, a violation of Section 143.3 occurred.

Appellant's contention that Rule 143.3 has been preempted by Penal Code sections 318.5 and 318.6 is devoid of merit. The preemption argument vis-a-vis 318.5 and 318.6 of the Penal Code has been laid to rest by the District Court of Appeal decision in Kirby v. Alcoholic Bev. Control Appeals Bd. & 552 Broadway, Inc., et al., 47 Cal.App.3d 360, wherein the District Court of Appeal reviewed Crownover v. Musick, 9 Cal.3d 405, and decided that the State Legislature's grant of authority to local governments with regard to the regulation of attire of waiters and entertainers in public premises under Penal Code sections 318.5 and 318.6 did not preempt Department Rule 143. The Court further stated: "Since the rule was promulgated pursuant to the department's constitutional authority to regulate the sale of drinks in premises it licenses, no issue of preemption is involved." (At p. 366.) We also note a review of Kirby was denied by the California Supreme Court on June 19, 1975. Furthermore, we are here concerned with an administrative rule rather than a penal code provision.

Appellant's apparent further contention, that Crownover, supra, clearly establishes that regulation of attire by waitresses, waiters, and entertainers is a matter

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of local control and not within the scope of the department's licensing authority was also laid to rest in Kirby, supra, when it stated: "Thus, we conclude Rule 143.3, promulgated by the department pursuant to its exclusive power to license and regulate the sale of alcoholic beverages in this state under article XX, section 22, does not conflict with sections 318.5 and 318.6 of the Penal Code, which merely permit cities and counties to adopt penal ordinances regulating 'topless' and 'bottomless' exposure in establishments serving food or beverages and other public places. (Crownover v. Musick, supra, pp. 416 - 418.)"

The fact that the premises may be licensed as a theater does not deprive the department of authority to enforce its rules; it still remains a premises licensed by the department.

The evidence supports the findings and the findings support the department's decision. The department's decision is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Patricia Wilkey
Eugene V. Lipp

2nd CIV. NO.
5 0 9 6 7

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

ROBERT R. SCOTT,
dba SLICK NICK'S,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA and
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondents.

NOTICE OF APPEAL

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Attorney for Petitioner

EXHIBIT G

2ND CIV.
50967

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

ROBERT R. SCOTT
dba SLICK NICK'S,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE
CONTROL OF THE STATE OF CALIFORNIA
and ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,

Respondents.

NOTICE OF APPEAL

TO THE RESPONDENTS in the above-entitled case:

PLEASE TAKE NOTICE that Petitioner, Robert R. Scott
hereby appeals to the United States Supreme Court from the order
of the Court of Appeal denying the Petition for Writ of Review.

Dated: July 20, 1977

KENNETH P. SCHOLTZ
Attorney for Petitioner